In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-39

RONALD OLIVE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the courts below erred in refusing to order expungement of all federal records relating to their indictment and trial after they were acquitted of the criminal charges brought against them.

In August 1973, petitioners, who are St. Louis police officers, were indicted by a federal grand jury for alleged violations of 18 U.S.C. 242, deprivation of civil rights under color of law, and 18 U.S.C. 2236, conducting an illegal search. At the close of the government's case, the district court granted petitioner Olive's motion for judgment of acquittal as to several counts, and, subsequently, the jury returned a verdict acquitting both petitioners of the remaining charges. Petitioners then filed a motion for expungement of all federal records

"arising directly or indirectly as a result of the[ir] arrest,[1] indictment or trial * * * " (Pet. 5). The motion was denied by the district court and the denial was affirmed by the court of appeals (Pet. App. A-1 to A-2).

1. In holding that petitioners were not entitled to expungement in the absence of proof that their indictment or prosecution had been legally or constitutionally improper, the court of appeals correctly implemented well-established legal principles. As the court of appeals held, the Department of Justice is required by statute to maintain criminal identification records, 28 U.S.C. 534, and the mere fact of acquittal does not justify expungement (Pet. App. A-2). See *United States* v. *Linn,* 513 F. 2d 925 (C.A. 10); *United States* v. *Seasholtz,* 376 F. Supp. 1288 (N.D. Okla.); *United States* v. *Dooley,* 364 F. Supp. 75 (E.D. Pa.); *United States* v. *Rosen,* 343 F. Supp. 804 (S.D. N.Y.); *Wheeler* v. *Goodman,* 306 F. Supp. 58 (W.D. N.C.), vacated on other grounds, 401 U.S. 987.

2. Petitioners contend (Pet. 10) that the court of appeals and other federal courts have failed to identify the "abnormal" cases in which expungement is justified. However, since petitioners show no impropriety at all in their indictment and prosecution but rely only on the fact of their acquittal, expungement is clearly not justified in their case. Moreover, the court below and other federal courts have deliniated the situations in which expungement may be ordered. Thus, courts have ordered expungement of records maintained in connection with

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[1]Petitioners were never arrested. After their indictment they were served with criminal summonses. Thus, arrest records, as such, do not exist (Pet. App. A-2).

unconstitutional arrests,[2] illegal police harassment of citizens,[3] arrests made under an unconstitutional statute[4] and, in some circumstances, arrests made by error when no criminal charges are brought.[5] Petitioners do not contend that they were the victims of any such conduct, nor could facts be adduced which would support such allegations. There is thus nothing in this case which would justify interference "with the legitimate interests of Government law enforcement agencies in maintaining records of their own activities" (Pet. App. A-2).

The fact that petitioners are police officers does not justify according them different treatment from that accorded other persons who have been acquitted of criminal charges. Petitioners contend (Pet. 9) that their ability to testify against criminal defendants will be

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[2]*Sullivan* v. *Murphy*, 478 F.2d 938 (C.A. D.C.) (mass arrests without probable cause); *United States* v. *McLeod*, 385 F. 2d 734 (C.A. 5) (arrests for purpose of interfering with the right of black persons to vote); *Bilick* v. *Dudley*, 356 F. Supp. 945 (S.D. N.Y.) (mass arrests without probable cause); *Kowall* v. *United States*, 53 F.R.D. 211 (W.D. Mich.) (arrest illegal under *Gutknecht* v. *United States*, 396 U.S. 295); *Hughes* v. *Rizzo*, 282 F. Supp. 881 (E.D. Pa.) (unconstitutional mass arrest).

[3]*Wheeler* v. *Goodman*, *supra* (systematic harassment by police).

[4]*Severson* v. *Duff*, 322 F. Supp. 4 (M.D. Fla.) (unconstitutional state disorderly conduct statute).

[5]*Menard* v. *Saxbe*, 498 F.2d 1017 (C.A. D.C.).

impaired if their records are not expunged, but both Missouri[6] and federal[7] law prohibit the use of evidence of arrest or indictment to impeach the credibility of a witness, and petitioners were not convicted of the offenses charged.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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[6]Mo. Rev. Stat. §491.050 (1975 Cum. Supp.); *State v. Rumfelt*, 258 S.W. 2d 619 (Mo. Sup. Ct.).

[7]Federal Rules of Evidence, Rule 609.